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# Fixing a Non-Existent Problem with an Ineffective Solution: Doe v. Snyder and Michigan's Punitive Sex Offender Registration and Notification Laws

Joshua E. Montgomery

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# **FIXING A NON-EXISTENT PROBLEM WITH AN INEFFECTIVE SOLUTION: *DOE V. SNYDER* AND MICHIGAN’S PUNITIVE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS**

*Joshua E. Montgomery\**

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\* B.S., The University of Akron, 2015; J.D. Candidate, The University of Akron School of Law, May 2018. I would like to extend my sincerest thanks to my parents, Amy and Joel Montgomery, my wife, Gabrielle Montgomery, Professor Wilson Huhn, and my friend, Frank George. Without your guidance, influence, and contributions, I would—quite literally—not have been able to write this article. Mom and Dad, thank you for teaching me nearly everything I know about the English language, for nurturing my inquisitive spirit, and for showing me that every person has inherent value. Gab, thank you for supporting me during the many evenings I spent in the library instead of with you, and for patiently helping me write in plain, understandable English. Professor Huhn, thank you for showing me how to most effectively frame my arguments and for providing many helpful suggestions. Frank, thank you for editing numerous drafts of this article, for poking holes in my arguments, and for helping me fill those holes—but mostly, thank you for helping make the process of researching and writing this article incredibly fun.

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*“The reality is sex offenders are a great political target. But that doesn’t mean any law under the sun is appropriate.”*<sup>1</sup>

## I. INTRODUCTION

*Sex offender.* This is an extremely consequential label, carrying with it a harsh—and often unjustified—stigma. Virgil McCranie certainly did not want this label.<sup>2</sup> Virgil was 19 years old and his girlfriend Misty was 14 years old when they first had sex.<sup>3</sup> But later, Misty learned that Virgil

1. Ryan Keith, *Illinois Measure Would Move Some from Sex Offender List to New Registry*, DAILY CHRONICLE (June 24, 2006) (quoting then-Illinois-State-Representative John Fritchey), <http://www.daily-chronicle.com/2006/06/19/measure-would-move-some-from-sex-offender-list-to-new-registry/aqriqsz/news04.txt> [https://perma.cc/ZN4R-D3QJ].

2. Bill Kaczor, *Crist Delays Decision on Florida ‘Romeo-Juliet’ Case*, SUN SENTINEL (June 11, 2009), <http://www.sun-sentinel.com/news/florida/sfl-romeo-juliet-sex-offender-061009-story.html> [https://perma.cc/29RR-D2MT].

3. *Id.*

had cheated on her, so she told her father that she had slept with Virgil.<sup>4</sup> Enraged, Misty's father went to the police with this information; Virgil was subsequently charged with statutory rape.<sup>5</sup> Because she was under the age of consent at the time she and Virgil had sex, Misty could not have legally consented.<sup>6</sup> Although he ultimately avoided prison, Virgil agreed to a plea deal that required him to register as a sex offender.<sup>7</sup>

Virgil and Misty eventually reconciled, married, and had children together.<sup>8</sup> Virgil even received a pardon and is no longer registered as a sex offender.<sup>9</sup> But the stigma associated with his sex-offender status followed Virgil for many years. He testified to the Florida Board of Executive Clemency that he had lost 17 jobs solely because of his sex-offender status.<sup>10</sup> Before he was pardoned, Virgil's name, address, picture, a map identifying where he lived, vehicle description, and license plate number were all posted on the state's publicly accessible sex offender website.<sup>11</sup> Yet, Virgil had never been charged with any other crimes.<sup>12</sup> He was never found guilty, nor did he plead guilty to a sex offense.<sup>13</sup> But because he was required to register as a sex offender, Virgil had to live with the onerous stigma of his sex-offender label—a stigma that his children also had to experience. On a daily basis, Virgil had to live with the harsh consequences—consequences bearing a striking resemblance to punishment—that accompanied his sex-offender label.<sup>14</sup>

When Virgil was required to register in 1994, sex offender registration laws were in their infancy. The registration and notification requirements imposed upon individuals like Virgil would expand significantly in the years that followed. As the United States Congress passed subsequent sex offender registration legislation, state legislatures followed suit, placing increasingly expansive restrictions on sex offenders. These registration and notification laws applied not only to

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4. *Id.*

5. *Id.*

6. *Id.*

7. The prosecutor agreed to drop the charge of rape in exchange for Virgil's plea of no contest to the charge of lewd and lascivious behavior. *Id.*

8. *Id.*

9. Chanakya Sethi, *The Ridiculous Laws that Put People on the Sex Offender List*, SLATE (Aug. 12, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/08/mapped\\_sex\\_offender\\_registry\\_laws\\_on\\_statutory\\_rape\\_public\\_urination\\_and.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/mapped_sex_offender_registry_laws_on_statutory_rape_public_urination_and.html) [https://perma.cc/4FTC-5YXT].

10. Kaczor, *supra* note 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

those who committed sex offenses *after* the states adopted these more expansive restrictions, but also to those who committed sex offenses *before* the states adopted them.

When Megan's Law (the federal Act that required the release of sex offender registration data to the public) passed the United States House of Representatives, several congressmen expressed concern over the constitutionality of certain provisions of the law.<sup>15</sup> They feared that the regulatory scheme that was in place to monitor sex offenders would be susceptible to ex post facto constitutional challenges on the grounds that these laws, although intended to be civil and regulatory, actually prescribed retroactive *punishment*.<sup>16</sup> These congressmen were particularly concerned that sex offender registration laws would subject released sex offenders to further punishment in the form of threats and discrimination, which would surely be directed at individuals publicly known to be "sex offenders."<sup>17</sup> The congressmen feared that future sex offender registration legislation could cross the line that divides regulatory laws from punitive laws, so they admonished Congress to exercise caution when considering future sex offender legislation proposals.<sup>18</sup>

Upon signing Megan's Law, President Clinton was asked if he was concerned that the federal courts would conclude that Megan's Law effectively retroactively punished sex offenders in violation of the Ex Post Facto Clause.<sup>19</sup> President Clinton said he was confident the law was constitutional and would be upheld by the federal district courts, appellate courts, and, if necessary, the Supreme Court.<sup>20</sup> And he was right. Indeed, not only was the President correct that Megan's Law would be upheld as constitutional by all of the federal courts—including the Supreme Court<sup>21</sup>—but subsequent sex offender laws would also be upheld in all of the federal circuit courts.

State sex offender registration laws seemed immune to ex post facto constitutional challenges in the federal courts, even as those laws placed increasingly burdensome restrictions on released sex offenders.<sup>22</sup> The

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15. Megan's Law, Pub. L. No. 104-105, 110 Stat. 1345 (1996) (codified at § 42 USC 13071 (2012)); H.R. REP. NO. 104-555, at 9 (1996) (Congressmen Rick Boucher, Bobby Scott, Melvin L. Watt, and John Conyer's, Jr. expressed their additional views on Megan's Law in the House Report on the bill).

16. H.R. REP. NO. 104-555, at 9 (1996).

17. *Id.*

18. *Id.* at 10.

19. See Remarks on Signing Megan's Law and Exchange with Reporters, 32 WEEKLY COMP. PRES. DOC. 877-78 (May 17, 1996).

20. See *id.* at 878.

21. *Smith v. Doe*, 538 U.S. 84 (2003).

22. See *infra* note 32; see also discussion *infra* Part II.A, II.C.

courts consistently gave great deference to the legislatures when deciding if these laws were in violation of the Ex Post Facto Clause. They reasoned that as long as a rational connection existed between the law and the non-punitive purpose for which it was enacted—safeguarding the public from sexual violence—then the law was constitutional. The reviewing courts structured their analyses on the premise that sex offenders recidivate at alarmingly high rates; this was the problem the legislatures sought to remedy. The legislatures believed that rigorous restrictions on sex offenders would deter them from committing sex offenses in the future, and thereby promote public safety. Based on these premises, it was not difficult for the federal courts to find a rational connection between the sex offender registration laws and the non-punitive purpose of protecting the public from sexual violence.

However, in *Doe v. Snyder*, the Sixth Circuit Court of Appeals questioned the very premises upon which all the previous federal courts based their analyses.<sup>23</sup> The problem identified by Congress and state legislatures (including Michigan's)<sup>24</sup> as the justification for enacting sex offender registration and notification laws—alarmingly high rates of recidivism—simply does not exist. Some sex offenders recidivate, but only a small percentage of them do so.<sup>25</sup> Further, research has shown that registration and notification laws do not serve their intended purpose of recidivism reduction.<sup>26</sup> In fact, recent data shows that, contrary to their expressed purpose, sex offender registration and notification laws can even *increase* recidivism rates.<sup>27</sup> Thus, the *Snyder* court memorialized these findings in its opinion, concluding that 1) recidivism rates of sex offenders are not, in fact, nearly as high as they have been portrayed to be, and 2) that many of the restrictions placed on sex offenders may actually *increase* recidivism rates of sex offenders.<sup>28</sup> This is not to say that even one instance of recidivism does not pose a problem to be addressed.<sup>29</sup>

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23. *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

24. *Id.* at 704 (“It’s professed purpose is to deter recidivism.”).

25. *See infra* Part V.C (reviewing empirical data on sex offender recidivism and concluding that sex offender recidivism rates are actually much lower than they are commonly perceived to be).

26. *See infra* Part VI.B (explaining that empirical data on the impacts of registration and notification laws shows that such restrictions do not reduce recidivism).

27. *See infra* Part VI.B.

28. *See Snyder*, 834 F.3d at 704-05.

29. In an October 31, 2006 phone interview with Human Rights Watch, Dr. Jill Levenson said, “[s]exual violence is a serious problem, and any recidivism rate is too high. But recidivism rates for sex offenders are not as high as politicians have quoted in their attempts to justify the need for overly harsh sex offender laws.” Dr. Levenson is a professor of Human Services at Lynn University and a national expert on sex offender management. *No Easy Answers*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us#730a8b>

But that problem must be accurately identified, and the solution must be appropriately tailored to solve that problem. The Michigan legislature, like many other state legislatures across the United States, did not identify the problem correctly, nor did it tailor its remedy in a way that would address that problem. Instead, the Michigan legislature identified a non-existent problem—extremely high recidivism rates—and attempted to remedy that problem with an ineffective solution—expansive, offense-based reporting and notification requirements.

This Article examines the Sixth Circuit's recent *Doe v. Snyder* decision and argues that the *Snyder* court correctly found Michigan's Sex Offender Registration Laws unconstitutional, in part because the court questioned certain assumptions upon which the validity of sex offender registration laws rest. Part II of this Article examines the enactment, evolution, and expansion of sex offender registration laws in this country. Part III examines how the Sixth Circuit became the first federal appellate court to find substantial provisions of a sex offender registration law unconstitutional on ex post facto grounds. Specifically, this section details how the court questioned both the assumption that sex offenders recidivate at alarmingly high rates and the assumption that sex offender registration laws reduce recidivism.

Part IV frames the arguments that the rest of this Article discusses by questioning whether a rational relationship exists between sex offender registration requirements and the non-punitive purpose of deterring recidivism. Part V reviews the systematic, gross mischaracterization of sex offender recidivism rates; contrary to popular opinion, sex offenders recidivate at very low rates. This section first examines the history of ex post facto challenges to sex offender registration laws in the federal courts, then argues that major Supreme Court cases misapplied recidivism data, and finally examines current recidivism data, which shows that sex offenders actually recidivate at very low rates.

Next, Part VI explains that the conventional wisdom, which assumes that sex offender registration laws actually reduce recidivism, is wrong. Finally, Part VII concludes by urging the federal courts to align themselves with the Sixth Circuit by finding that similar sex offender registration laws are, in effect, punitive, and therefore violate the Ex Post Facto Clause of the Constitution. Once these courts accept that sex offender registration laws do not reduce sex offender recidivism rates—which, contrary to popular belief, are already very low—they will recognize that many of these laws, as currently constructed, are merely

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[<https://perma.cc/T3MA-AGQ9>].

punitive and provide little benefit to society.

## II. THE EFFECT OF *SMITH V. DOE*: STATE SEX OFFENDER REGISTRATION LAWS ARE VIEWED BY THE FEDERAL COURTS AS CONSTITUTIONAL, NON-PUNITIVE, CIVIL REGULATIONS

Sex Offender Registration Acts, referred to as SORAs, have traditionally been regarded as regulatory laws that, while retroactive in their application, do not, in effect, prescribe criminal punishment.<sup>30</sup> In the landmark case *Smith v. Doe*, the Supreme Court ruled that Alaska's SORA, which applied retroactively, was not in effect punitive and was, therefore, constitutional.<sup>31</sup> *Smith's* logic has since been followed by every federal circuit court.<sup>32</sup>

### A. *Brief Overview of Sex Offender Registration Legislation*

To understand the context in which the Supreme Court's *Smith* decision was made, it is first necessary to briefly review the history of sex offender registration laws. In 1994, the United States Congress passed the

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30. *Smith v. Doe*, 538 U.S. 84 (2003).

31. *Id.* at 105-06.

32. *See Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016) (holding that the reporting and residency requirements of Oklahoma's SORA did not violate the Ex Post Facto Clause because the requirements did not resemble traditional forms of punishment and were consistent with the non-punitive objective of protecting public safety); *Riley v. Corbett*, 622 F. App'x 93 (3d Cir. 2015) (per curiam) (holding that Pennsylvania's SORA did not violate the Ex Post Facto Clause because the SORA's requirements were not, in effect, punitive); *Doe v. Cuomo*, 755 F.3d 105 (2d Cir. 2014) (holding that New York's SORA's requirements were not in violation of the Ex Post Facto Clause because they were not, in effect, punitive); *King v. McCraw*, 559 F. App'x 278 (5th Cir. 2014) (holding that Texas' SORA was not an Ex Post Facto Clause violation because it was not, in effect, punitive); *United States v. Shannon*, 511 F. App'x 487 (6th Cir. 2013) (rejecting the Defendant-Appellant's claim that Ohio's SORA was punitive in violation of the Ex Post Facto Clause because the Defendant-Appellant failed to show that the SORA was, in effect, punitive); *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013) (holding that the federal Sex Offender Registration and Notification Act's registration requirements were not in violation of the Ex Post Facto Clause because they were not, in effect, punitive); *ACLU v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (holding that Nevada's SORA was not an Ex Post Facto Clause violation because it was not, in effect, punitive); *United States v. Parks*, 698 F.3d 1 (1st Cir. 2012) (holding that the federal Sex Offender Registration and Notification Act's requirements were not in violation of the Ex Post Facto Clause because they were not, in effect, punitive); *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011) (holding that the judicial requirement that an inmate register as a convicted sex offender as a condition of his supervised release did not violate the Ex Post Facto Clause because the registration requirements were not, in effect, punitive); *Steward v. Folz*, 190 F. App'x 476 (7th Cir. 2006) (holding that the requirements of Indiana's SORA were not punitive and, therefore, were not in violation of the Ex Post Facto Clause); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (holding that Iowa's SORA's requirements were not in violation of the Ex Post Facto Clause because they were not, in effect, punitive).



Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), which required states to create and maintain a non-public registry of persons convicted of sex offenses for the benefit of law enforcement.<sup>33</sup> In 1996, Congress passed Megan's Law, which amended the Wetterling Act to require public disclosure of information contained in sex offender registration databases.<sup>34</sup> Congress further amended the Wetterling Act in 1996 to require, among other things, that certain serious sex offenders and recidivists register for life.<sup>35</sup> Notably, these SORAs were applied not only to persons who committed sex offenses after these laws were enacted, but also to persons who committed sex offenses before the SORAs were enacted.<sup>36</sup>

The State of Alaska, like many other states, enacted its own SORA in 1994 pursuant to the Wetterling Act.<sup>37</sup> Alaska's SORA contained both registration and notification requirements and required sex offenders present in the state to register with local law enforcement within one day of their convictions or upon entering the state.<sup>38</sup> The Alaska SORA required the sex offender to provide his name, address, an anticipated change of address, place of employment, date of birth, aliases used, identifying features, conviction information, driver's license number, information about vehicles to which he had access, and post-conviction treatment history, among other things.<sup>39</sup> With the exception of driver's license information and an anticipated change of address, all of the above information was made public.<sup>40</sup> Additionally, sex offenders convicted of *aggravated* sex offenses were required to register for life and verify their information quarterly.<sup>41</sup> As with the federal registration requirements, Alaska's SORA applied retroactively.<sup>42</sup>

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33. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. § 14071 (2012)), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Title I, § 129(a), 120 Stat. 600.

34. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 13701 (2012)).

35. See Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093.

36. *Id.*

37. ALASKA STAT. § 12.63.010 (Lawserver through 1994 legislation).

38. *Id.* § 12.63.010(a)(1), (a)(2).

39. *Id.* STAT. § 12.63.010(b)(1).

40. *Id.* STAT. § 12.63.010(b); ALASKA STAT. § 18.65.087(b) (Justia through 1994 legislation).

41. ALASKA STAT. §§ 12.63.010(d)(2) (Lawserver through 1994 legislation), *Id.* § 12.63.020(a)(1). ALASKA STAT. § 12.63.100 (Justia through 1994 legislation) defines "aggravated sex offense" to include, among other things, first- and second-degree sexual assault and first- and second-degree abuse of a minor.

42. ALASKA STAT. § 12.63.010 (Lawserver through 1994 legislation).

B. *The Smith v. Doe Ruling: Alaska's Sex Offender Registration Statutes Created a Constitutional, Non-Punitive, Civil Regulatory Scheme*

The respondents in *Smith* were two sex offenders who had been convicted of sexual abuse of a minor—an aggravated sex offense.<sup>43</sup> Both respondents were subjected to the above mentioned registration and notification requirements.<sup>44</sup> The respondents challenged the constitutionality of Alaska's SORA in the United States District Court for the District of Alaska, claiming that it violated the Ex Post Facto Clause of Article 1, § 10 of the United States Constitution and the Due Process Clause of § 1 of the Fourteenth Amendment.<sup>45</sup> The district court granted summary judgment for the petitioners, the Alaskan government.<sup>46</sup> On appeal, the Ninth Circuit Court of Appeals held that, while the Alaska legislature had not intended the SORA to be punitive, the SORA nonetheless imposed punishment and was an unconstitutional ex post facto law.<sup>47</sup> The Supreme Court granted certiorari and ultimately reversed in 2003, finding that Alaska's SORA was a non-punitive civil regulation and was, therefore, constitutional.<sup>48</sup>

To reach its conclusion, the Supreme Court engaged in a two-part analysis that has become the standard by which all ex post facto challenges to the constitutionality of SORAs are measured.<sup>49</sup> First, the Court examined whether the legislature intended to create a punitive system of laws or a non-punitive civil regulatory scheme.<sup>50</sup> Concluding that the legislature clearly intended to create a civil regulatory scheme, the Court moved on to the second part of the test, which examines whether “the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.”<sup>51</sup> Because legislative intent is ordinarily given great deference, a legislature's stated intent can only be overcome by “the clearest proof” that a civil regulatory scheme is actually punitive in effect.<sup>52</sup> To determine whether Alaska's SORA was punitive in effect, the Court examined the five most-relevant factors established in *Kennedy v. Mendoza-Martinez*, which query whether the regulatory

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43. *Smith v. Doe*, 538 U.S. 84, 91 (2003).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 91-92.

48. *Id.* at 105-06.

49. *Id.* at 92.

50. *Id.*

51. *Id.* at 85.

52. *Id.*

scheme: “[1] [has] been regarded in our history and traditions as a punishment; [2] impose[s] an affirmative disability or restraint; [3] promote[s] the traditional aims of punishment; [4] [has] a rational connection to a non-punitive purpose; or [5] [is] excessive with respect to this [non-punitive] purpose.”<sup>53</sup>

With regard to whether the registration and notification requirements of Alaska’s SORA resembled historical and traditional punishment, the respondents argued that the SORA’s requirements—especially its public notification requirements—resembled early colonial public-shaming punishments.<sup>54</sup> However, in response to this argument, the Court stated that “the stigma of Alaska’s [SORA] results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”<sup>55</sup> While the Court acknowledged that publicity may cause adverse social consequences for a convicted sex offender, the Court pointed out that “the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.”<sup>56</sup>

The Court also found that Alaska’s SORA did not impose an affirmative disability or restraint, in part because its restrictions did not resemble imprisonment, which the Court referred to as the “paradigmatic affirmative disability or restraint.”<sup>57</sup> The Court further noted that the periodic updates required by the SORA did not have to be made in person and that persons subject to the conditions of Alaska’s SORA were free to move, live, and work wherever they wished with no supervision.<sup>58</sup> The Court then acknowledged that Alaska’s SORA promoted some of the traditional aims of punishment, such as deterrence, but explained that “any number of governmental programs might deter crime without imposing punishment.”<sup>59</sup> For this reason, this factor was given little weight.<sup>60</sup>

The Court then examined the most heavily-weighted factor for this type of inquiry: whether the SORA had a rational relation to a non-punitive purpose.<sup>61</sup> The parties did not dispute that Alaska’s SORA had a legitimate, non-punitive, and rational purpose of “public safety, which is advanced by alerting the public to the risk of sex offenders in their

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53. *Id.* at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

54. *Id.*

55. *Id.* at 98.

56. *Id.* at 99.

57. *Id.* at 100.

58. *Id.* at 101.

59. *Id.* at 102.

60. *Id.*

61. *Id.*

communit[y].”<sup>62</sup> However, the respondents argued that the SORA’s restrictions were not narrowly tailored to accomplish the purpose of protecting the public, pointing out that the SORA applied to all sex offenders *without making any individual assessment* of their future dangerousness.<sup>63</sup> The Court first noted that “[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.”<sup>64</sup>

The Court then addressed the first point regarding the universal application of Alaska’s SORA, explaining that it was rational for the Alaska legislature to conclude that a sex-offense conviction would be sufficient evidence of a “substantial risk of recidivism.”<sup>65</sup> The Court stated that the Alaska legislature’s categorical conclusion was consistent with national concerns regarding the risk of recidivism of sex offenders—a risk that the Court described as “frightening and high.”<sup>66</sup> Based upon its brief and generalized conclusion that sex offenders recidivate at alarmingly high rates, the Court concluded that “[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.”<sup>67</sup>

The respondents also argued that Alaska’s SORA was excessive in relation to its regulatory purpose because the public had easy, unrestricted access to the sex offender registry data.<sup>68</sup> However, the Court quickly dismissed this argument by explaining that, while anyone could access the information, the dissemination of that data was passive—people had to look up the information to access it.<sup>69</sup> The Court also found that Alaska’s SORA’s requirements were not excessive with regard to its non-punitive purpose, explaining that the inquiry under this factor was not whether the means chosen by Alaska’s legislature were the most prudent, but instead the inquiry was merely whether the means chosen were reasonable.<sup>70</sup> The Court concluded that the regulatory scheme imposed by Alaska’s SORA was reasonable.<sup>71</sup>

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62. *Id.* at 103 (internal citations omitted).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

67. *Id.*

68. *Id.*

69. *Id.* at 105.

70. *Id.*

71. *Id.* at 105-06.

### C. *Post-Smith v. Doe Legislation and Jurisprudence*

In 2006—three years after the Supreme Court’s decision in *Smith*—the United States Congress passed the Adam Walsh Child Protection and Safety Act (Walsh Act), which replaced much of the Wetterling Act by creating a more comprehensive sex offender registration and notification scheme.<sup>72</sup> Among the expansive provisions of the Walsh Act were the requirements that sex offender registrants be divided into three tiers: tier one offenders are required to update their information yearly and must do so for 15 years; tier two offenders are required to update their information every 6 months and must do so for 25 years; and tier three offenders must update their information every three months and must do so for life.<sup>73</sup> While these categories relate to current dangerousness, they are not based on individual assessments; instead, these categorizations are based only on the offense committed.<sup>74</sup>

Since the enactment of the Walsh Act and the Supreme Court’s ruling in *Smith*, all of the federal circuit courts have heard *ex post facto* constitutional challenges to state SORAs and none of them have found that a state SORA’s requirements were punitive.<sup>75</sup> None, that is, until *Doe v. Snyder*.<sup>76</sup>

### III. THE *DOE V. SNYDER* COURT FOUND THAT MICHIGAN’S SEX OFFENDER REGISTRATION ACT WAS PUNITIVE AND, THEREFORE, VIOLATED THE EX POST FACTO CLAUSE

Like many other states, Michigan enacted a SORA pursuant to the Wetterling Act.<sup>77</sup> Consistent with the nationwide trend, Michigan’s sex offender registration laws gradually grew and evolved.<sup>78</sup> Although originally only a private tool for use by law enforcement, Michigan’s SORA was amended to require offenders to register in person, to make the registry available to the public, and to include pictures of sex offenders.<sup>79</sup> In 2005, the SORA was amended to prohibit sex offenders

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72. 42 U.S.C. §16911 (2012).

73. *Id.* The Walsh Act strongly encouraged states’ compliance with the federal regulatory scheme by conditioning 10% of each state’s federal crime control funds under 42 U.S.C. § 3750 (2012) on the states’ compliance with the new regulations. 42 U.S.C. § 16925 (2012).

74. 42 U.S.C. § 16911 (2012).

75. *See supra* note 32.

76. *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

77. 1994 Mich. Pub. Act 295 § 10 (codified at MICH. COMP. LAWS § 28.723 (2011)).

78. 1999 Mich. Pub. Act 85 §§ 5a(4), 8(2), 10(2)(3); 2004 Mich. Pub. Acts 237, 238.

79. 1999 Mich. Pub. Act 85 §§ 5a(4), 8(2), 10(2)(3); 2004 Mich. Pub. Acts 237, 238.

from living, working, or loitering within 1,000 feet of a school.<sup>80</sup> By 2011, the Michigan legislature added the requirement that sex offenders be divided into three tiers based not on any individualized assessment of their dangerousness, but on the severity of the crime they committed.<sup>81</sup> Consistent with the federal SORAs, Michigan's SORA requirements applied retroactively.<sup>82</sup>

Six individuals who were required to register as tier three sex offenders brought suit in the United States District Court for the Eastern District of Michigan, claiming, among other things, that Michigan's SORA's retroactive application to them was a violation of the Ex Post Facto Clause of the United States Constitution.<sup>83</sup> The District Court found that the major provisions of Michigan's SORA did not violate the Ex Post Facto Clause.<sup>84</sup>

On appeal, the Sixth Circuit devoted the bulk of its review to the issue of whether Michigan's SORA was punitive in effect.<sup>85</sup> Utilizing the five salient *Mendoza-Martinez* factors outlined in *Smith*, the *Snyder* court first found that Michigan's SORA "inflict[ed] what has been regarded in our history and traditions as punishment[.]"<sup>86</sup> In support of this finding, the *Snyder* court stated that the SORA resembled the ancient punishments of banishment, public shaming, and parole or probation.<sup>87</sup> The court also found that Michigan's SORA imposed an affirmative disability or restraint because it severely limited where registrants could live, work, and loiter—restrictions the court described as "direct restraints on personal conduct."<sup>88</sup> Further, the court found that the SORA's restrictions advanced the traditional aims of punishment, but nonetheless gave this

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80. 2005 Mich. Pub. Acts 121, 127.

81. 2011 Mich. Pub. Acts 17, 18.

82. 2006 Mich. Pub. Act 46; 2011 Mich. Pub. Acts 17, 18.

83. *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016). Plaintiffs argued that the impact of the registration and notification requirements reached "far beyond the stigma of simply being identified as a sex offender on a public registry." Plaintiffs explained that many of them have great difficulty finding jobs or homes where they can legally live or work due to the school zone restrictions; many of them who have children or grandchildren are barred from attending their children or grandchildren's school plays or sporting events; all of the plaintiffs have to frequently report to law enforcement in person to update information regarding a change of residence, change of employment, change in status as a student, name changes, new email addresses or other internet identifiers, travel plans, or plans to buy or sell a vehicle. *Id.* at 698.

84. *Id.* at 698-99.

85. The *Snyder* court also examined whether the Michigan legislature intended to create a punitive set of laws, but quickly determined that the legislature intended to create a civil regulatory scheme. *Id.* at 700-01.

86. *Id.* at 701.

87. *Id.*

88. *Id.* at 703.

factor little weight because many civil regulations can also advance some of the traditional aims of punishment, such as deterrence.<sup>89</sup>

The court then announced an unprecedented holding in the federal courts: Michigan's SORA lacked a rational connection to the non-punitive purpose of public safety (which the Michigan legislature thought would be achieved by preventing sex-offenders from recidivating).<sup>90</sup> The Supreme Court in *Smith* and other federal courts have accepted that recidivism rates of sex offenders are “frightening and high.”<sup>91</sup> Yet the *Snyder* court questioned that assumption, explaining that evidence in the record indicated that 1) sex offender recidivism rates are no higher than recidivism rates of other criminals (and may actually be lower than some other sorts of criminals), and 2) SORAs do not meaningfully reduce those recidivism rates.<sup>92</sup>

In fact, one statistical analysis suggested that laws such as Michigan's SORA actually *increase* the risk of recidivism, likely because the restrictions imposed by such laws exacerbate recidivism risk factors by making it extremely difficult for registrants to re-integrate into society.<sup>93</sup> Thus, the “rational connection” between the registration and notification requirements of Michigan's SORA and the legislature's intended purpose of preventing sex-offender recidivism was presumed to be this: monitoring sex offenders at every turn of their lives would deter them from recidivating at such high rates.<sup>94</sup> However, because empirical data in the appellate record contradicted this presumption, the registration and notification requirements of Michigan's SORA could no longer be said to have a rational connection to a non-punitive purpose.<sup>95</sup>

This conclusion that Michigan's SORA lacked a rational connection to a non-punitive purpose demanded that the court also find that the SORA was excessive in relation to that purpose.<sup>96</sup> It was clear that Michigan's SORA imposed significant restrictions on sex offenders.<sup>97</sup> But those significant restrictions were not counterbalanced by any proven positive

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89. *Id.* at 704.

90. *Id.* at 704-05.

91. *Id.* at 704 (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

92. *Id.* at 704-05 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003)).

93. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Law Affect Criminal Behavior?*, 54 J. L. & ECON. 161 (2011).

94. *Snyder*, 834 F.3d at 704-05.

95. *Id.*

96. *Id.* at 705.

97. *Id.*

effects—the restrictions did not deter recidivism.<sup>98</sup> Thus, the *Snyder* court found that all five *Mendoza-Martinez* factors weighed in favor of a finding that Michigan's SORA was, in effect, punitive.<sup>99</sup> This placed the holding of *Snyder* squarely at odds with the Supreme Court's holding in *Smith*.<sup>100</sup> However, the *Snyder* court distinguished the facts of this case from those in *Smith* by explaining that:

[a] regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law.<sup>101</sup>

It was on this basis that the *Snyder* court concluded that Michigan's SORA was punitive in effect and was, therefore, a violation of the Ex Post Facto Clause.

#### IV. IS THERE A RATIONAL RELATIONSHIP BETWEEN EXPANSIVE SEX OFFENDER REGISTRATION AND NOTIFICATION REQUIREMENTS AND THE PURPOSE OF DETERRING RECIDIVISM?

The United States Constitution states that "[n]o State shall . . . pass any . . . ex post facto law."<sup>102</sup> Although not so limited in its express language, this clause has been accepted in American jurisprudence only as a prohibition against retroactive application of *punitive* laws, but not *civil* laws.<sup>103</sup> James Madison described the prohibition of ex post facto laws as a "constitutional bulwark in favour of personal security and private rights."<sup>104</sup> Former Chief Justice John Marshall further explained that:

[w]hatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting

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98. *Id.*

99. *Id.* at 701-06.

100. *Id.* at 705-06.

101. *Id.* at 705.

102. U.S. CONST. art. I, § 10, cl. 1.

103. *Calder v. Bull*, 3 U.S. 386, 391 (1798).

104. ALEXANDER HAMILTON, JOHN JAY, & JAMES MADISON, *THE FEDERALIST* NO. 44, 232 (George W. Carey & James McClellan eds., The Gideon ed., Liberty Fund 2001).



that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.<sup>105</sup>

Those “violent acts which might grow out of the feelings of the moment”—ex post facto laws—were described by former Supreme Court Justice Samuel Chase as “manifestly unjust and oppressive.”<sup>106</sup>

The Supreme Court has also made it clear that the ex-post-facto nature of a law is determined not by its form, but by its effect.<sup>107</sup> Stated differently, a law may be passed with the intent to create a retroactive civil regulatory scheme; this is constitutional.<sup>108</sup> But if the effects of the law prove to be punitive, then the law will be considered a violation of the Ex Post Facto Clause of the Constitution.<sup>109</sup>

As noted in Part II above, the Supreme Court has stated that the most important factor to the analysis of whether a law is punitive in effect is whether the statute bears a rational connection to the non-punitive purpose for which it was enacted.<sup>110</sup> Time after time, petitioners in each of the federal circuit courts asserted that state SORAs lacked a rational connection to a non-punitive purpose.<sup>111</sup> But prior to *Snyder*, the federal courts routinely dismissed these arguments, explaining that a SORA need not be “narrowly drawn to accomplish [its] stated purpose” to be rationally related to that purpose.<sup>112</sup> The courts also explained that it is not their role to determine whether the legislatures chose the most prudent means to accomplish their goals; rather, the courts’ role is merely to determine whether those means were rational.<sup>113</sup> However, inherent in the federal courts’ analyses of these arguments were two unquestioned assumptions. The first assumption was that recidivism rates of sex offenders were frighteningly high.<sup>114</sup> The second assumption was that SORAs promote public safety by reducing recidivism.<sup>115</sup> But what if these assumptions are incorrect? What if recidivism rates of sex offenders are not nearly as high as they are commonly believed to be? What if state SORAs actually *increase* recidivism rates of sex offenders, instead of

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105. Fletcher v. Peck, 10 U.S. 87, 137-38 (1810).

106. *Id.*; *Calder*, 3 U.S. at 391.

107. Weaver v. Graham, 450 U.S. 24, 31 (1981).

108. *Id.*

109. *Id.* at 32.

110. See *supra* Part II.B; Smith v. Doe, 538 U.S. 84, 102 (2003).

111. *Smith*, 538 U.S. at 103.

112. *Id.*

113. *Id.*

114. See *supra* note 66.

115. See *supra* notes 92-93.

decreasing those rates? Can state SORAs still be said to bear a rational connection to a non-punitive purpose? The Sixth Circuit said no. Other circuits should follow suit.

V. EMPIRICAL STUDIES SHOW THAT, CONTRARY TO POPULAR BELIEF,  
THE RISK OF RECIDIVISM POSED BY SEX OFFENDERS IS NOT  
FRIGHTENINGLY HIGH

Congress and state legislatures have asserted, in varying terms, that their purpose in enacting SORAs was to promote public safety by deterring recidivism of sex offenders.<sup>116</sup> This purpose presupposes that sex offenders are likely to commit more sex offenses after they are released. Indeed, the Supreme Court pointed to the “frightening and high” rates of recidivism in *Smith*.<sup>117</sup> Yet, as time passed and SORA restrictions expanded, the federal courts continued to rely on *Smith*, giving very little, if any, consideration to whether sex offender recidivism rates were actually as high as the *Smith* Court stated they were. However, recent studies have indicated that sex offender recidivism rates are much lower than the frighteningly high rates they have been portrayed to be.<sup>118</sup>

A. *The Federal Courts Have Not Questioned the Validity of the Assumption That Recidivism Rates of Sexual Offenders are “Frightening and High”*

In *Riley v. Corbett*, the Third Circuit Court of Appeals entertained a challenge to the constitutionality of Pennsylvania’s Megan’s Law.<sup>119</sup> The petitioner, Riley, claimed that the application of Pennsylvania’s SORA to him violated the Ex Post Facto Clause because the SORA’s restrictions

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116. In *Smith*, the Court noted that the Alaska legislature “identified ‘protecting the public from sex offenders’ as the ‘primary governmental interest’ of the law.” *Smith v. Doe*, 538 U.S. 84, 93 (2003) (internal citations omitted). In *Snyder*, the court noted that the Michigan legislature’s stated purpose for enacting its SORA was to “better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders.” *Doe v. Snyder*, 834 F.3d 696, 700 (6th Cir. 2016). The stated purpose of the SORA in *U.S. v. Parks*, 698 F.3d 1, 5 (1st Cir. 2012) was “to protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders.” 42 U.S.C. § 16901 (2012).

117. *Smith*, 538 U.S. at 103 (internal quotations omitted).

118. See *supra* notes 92-93.

119. Riley, the petitioner in this case, was convicted of adult rape in 1985. He was required to register as a sex offender after Pennsylvania passed its SORA in 1995. Because of the nature of his offense, he was required to register for life as a tier three sex offender. *Riley v. Corbett*, 622 F. App’x 93, 94 (3d Cir. 2015).

were passed *after* he was convicted of his offense.<sup>120</sup> The *Riley* court relied on the Supreme Court's analysis in *Smith* to support its conclusion that the challenged provisions of Pennsylvania's SORA were not materially different from those in Alaska's SORA that were deemed non-punitive, and as a result, were not Ex Post Facto Clause violations.<sup>121</sup> Notably, the court cited directly to language from *Smith*, stating that "[t]he [Alaska] legislature found *that sex offenders pose a high risk of reoffending*, and identified protecting the public from sex offenders as the primary governmental interest of the law."<sup>122</sup> The Third Circuit did not question whether this assertion regarding recidivism was still valid, nor did it make any statement regarding the Pennsylvania legislature's view on sex offender recidivism rates.<sup>123</sup> The *Riley* court simply accepted that recidivism rates of sex offenders were still as high as they were presumed to be when the Supreme Court decided *Smith*.

Similarly, the Second Circuit has decided cases challenging the constitutionality of retroactively-applicable amendments to New York's SORA without giving much more than a passing glance at recidivism rates of sex offenders.<sup>124</sup> The Second Circuit, in support of its holding that New York's SORA's registration requirement amendments were regulatory and not punitive, stated that "registration . . . serves the general goal of protecting members of the public from *the potential dangers posed by convicted sex offenders*."<sup>125</sup> The court did not indicate in any way that the rates of recidivism of sex offenders were in question.<sup>126</sup> To the contrary, the court's acknowledgement of the "potential dangers posed by convicted sex offenders," coupled with its reliance on the Supreme Court's analysis in *Smith*,<sup>127</sup> indicate that the Second Circuit has also

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120. *Id.*

121. *Id.*

122. *Id.* at 95 (emphasis added) (quoting *Smith*, 538 U.S. at 93).

123. *Id.*

124. The petitioner in this case pleaded guilty to one count of attempted possession of a sexual performance by a child and was required to register annually as a tier one sex offender for ten years. At the time of his sentence, New York's SORA provided that "any sex offender required to register" could petition the sentencing court for relief. If relief was granted, the sex offender would no longer be required to register. *Doe v. Cuomo*, 755 F.3d 105, 108 (2d Cir. 2014). However, New York's SORA was amended in 2006 so that it 1) required tier one sex offenders to register for a period of 20 years, and 2) eliminated the ability of tier one sex offenders to petition for total relief from registration requirements. These amendments were applied to the petitioner, thereby eliminating his ability to petition for relief. *Id.* at 108-09.

125. *Id.* at 112 (emphasis added).

126. *Id.*

127. *Smith v. Doe*, 538 U.S. 84, 99, 103-05 (2003) (finding, among other things, that recidivism rates of sex offenders were "frightening and high").

accepted as fact the belief that sex offenders recidivate at high rates.<sup>128</sup> The First,<sup>129</sup> Eighth,<sup>130</sup> Tenth,<sup>131</sup> and Eleventh Circuits<sup>132</sup> have also followed *Smith* by accepting that recidivism rates of sex offenders are “frightening and high.”

In *King v. McCraw*, the Fifth Circuit was even more explicit in its assertion that sex offenders are dangerous recidivists.<sup>133</sup> The *McCraw* court cited to *Smith* in support of its conclusion that certain retroactively-applicable amendments to Texas’ SORA were not punitive in fact, stating that the “‘duration of the reporting requirements is not excessive’ because research has shown that a child molester may commit a ‘re-offense’ as many as 20 years after being released.”<sup>134</sup> Despite the fact that *McCraw*

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128. *Cuomo*, 755 F.3d at 112.

129. In *United States v. Parks*, 698 F.3d 1 (2012), the First Circuit aligned itself with *Smith* and all of the other circuits, finding that the federal Sex Offender Registration and Notification Act (the Walsh Act) was constitutional. The court did not focus individually on each of the *Mendoza-Martinez* factors; instead, the court compared the requirements of the Walsh Act to those of the Alaska statute in *Smith*. The court did not question whether recidivism rates of sex offenders were very high. In fact, the court did not even discuss that issue. By merely comparing the Walsh Act to the Alaska statute, the court implicitly assumed what the *Smith* Court explicitly stated—that recidivism rates are very high. Ultimately, the court found that, while the Walsh Act was slightly more burdensome than the Alaska statute (because it required sex offenders to register in person), it still was not punitive in effect. *Id.*

130. The Eighth Circuit ultimately rejected a constitutional challenge to a residency restriction in Iowa’s SORA, stating, “[i]n light of the high risk of recidivism posed by sex offenders, the [Iowa] legislature reasonably could conclude that § 692A.2A [the challenged residency restriction provision] would protect society by minimizing the risk of repeated sex offenses against minors.” *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (internal citation omitted).

131. In *Shaw v. Patton*, the Tenth Circuit held that certain residency restrictions contained in Oklahoma’s SORA were not punitive, in part because the restrictions were rationally related to the non-punitive purpose of protecting the public from the dangers posed by sex offenders. 823 F.3d 556, 574 (10th Cir. 2016).

132. In *United States v. W.B.H.*, the Eleventh Circuit found that the Walsh Act was not punitive in effect because it was rationally related to the non-punitive purpose of promoting public safety by restricting where sex offenders could live and work and by alerting the public as to their location. 664 F.3d 848, 859 (11th Cir. 2011). The court made this determination by quickly comparing this case to *Smith*, which assumed that sex offenders recidivate at alarmingly high rates. *Id.*

133. No sex offender registration legislation had been passed yet when the defendant, King, was charged with indecency with a child in 1990. King pleaded guilty, but was placed on deferred adjudication for indecency with a child and was placed on probation for ten years. A state court entered an order in 1996 terminating his probation and dismissing all proceedings against him. In 1991, Texas enacted its SORA, but individuals who had been placed on deferred adjudication were not required to register under the law. However, in 2005, the Texas legislature amended its SORA to require individuals who had been placed on deferred adjudication any time after 1970 to register. *King v. McCraw*, 559 F. App’x 278, 279 (5th Cir. 2014). The court ultimately held that applying Texas’ SORA to King was not unconstitutional, as the requirements that King register and then re-register annually were not punitive in effect. *Id.* at 282.

134. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 104 (2003)). See also *infra* Part V.B (explaining that this finding was from a study that is inapplicable to sex offenders as a whole and is inapplicable to all child molesters).

was decided 11 years after *Smith*, the *McCraw* court did not inquire further regarding more current recidivism data; instead, the court simply accepted the Supreme Court's statement and moved on.<sup>135</sup>

Prior to its decision in *Snyder*, the Sixth Circuit also accepted the "frightening and high" rates of sex offender recidivism. In *Doe v. Bredesen*, which involved a constitutional challenge to a portion of Tennessee's SORA on ex post facto grounds, the court concluded that the recidivism statistics relied upon by the Tennessee legislature provided a rational basis for the legislature to conclude that sex offender recidivism rates were, in fact, very high.<sup>136</sup> It followed, then, that the "stringent registration, reporting, and electronic surveillance requirements" of Tennessee's SORA were reasonable, constitutional measures designed to prevent future offenses by these dangerous recidivists.<sup>137</sup> The Tennessee law was also deemed to not be excessive in relation to its non-punitive purpose.<sup>138</sup>

Thus, the *Bredesen* court ultimately reached a conclusion that was consistent with the other circuit courts' rulings on this issue.<sup>139</sup> The court

135. See *King*, 559 F. App'x at 279.

136. Prior to 2004, the petitioner in this case was convicted of several offenses, including two counts of sexual battery. For this reason, he was classified as a "sexual offender" under the Tennessee law in effect at the time of his convictions. Under that law, ten years after a conviction, a sex offender could petition the circuit court for relief from registration. If the petition was granted, the individual would no longer be required to comply with the registration system; the individual's sex offender status and files would be expunged. But in 2004, Tennessee repealed that law and passed a new set of sex offender registration and monitoring acts. These new laws retroactively classified the petitioner as a "violent sexual offender." Violent sex offenders were required to register for life and could not petition for relief. Additionally, violent sex offenders were required to be monitored via satellite. *Doe v. Bredesen*, 507 F.3d 998, 1000-01 (6th Cir. 2007).

137. On this point, the *Bredesen* court concluded that "the Tennessee General Assembly could rationally conclude that sex offenders present an unusually high risk of recidivism." *Id.* at 1006.

138. Regarding the excessiveness of the Tennessee law with respect to its non-punitive purpose, the court first noted that it is not the duty of the court to determine whether the decision of the legislature was the most prudent. The court then explained that no basis existed to support a finding of excessiveness. *Id.*

139. Citing to a number of other circuits, the Sixth Circuit paused to "note that our sister circuits have likewise consistently and repeatedly rejected ex post facto challenges to state statutes that retroactively require sex offenders convicted before their effective date to comply with similar registration, surveillance, or reporting requirements." *Id.* at 1006-07 (citing to *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006), *cert. denied sub nom.* *Weems v. Johnson*, 550 U.S. 917 (2007); *Johnson v. Terhune*, 184 F. App'x 622 (9th Cir. 2006); *Steward v. Folz*, 190 F. App'x 476 (7th Cir. 2006); *Kirschenhunter v. Sheriff's Office, Beauregard Parish*, 165 F. App'x 362, 363 (5th Cir. 2006), *cert. denied*, 549 U.S. 913 (2006); *Szczygiel v. Madelen*, 116 F. App'x 224 (10th Cir. 2004); *Herrera v. Williams*, 99 F. App'x 188 (10th Cir. 2004); *Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870 (5th Cir. 2001); *Burr v. Snider*, 234 F.3d 1052 (8th Cir. 2000); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Roe v. Office of Adult Prob.*, 125 F.3d 47 (2d Cir. 1997); and *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997)).

accepted the view that recidivism rates were high. However, unlike the other circuits that simply assumed recidivism rates were high, the *Bredesen* court acknowledged that this assumption could be challenged. The court stated “[i]n view of United States Department of Justice statistics cited in the [Tennessee] Registration Act’s preamble, *the accuracy and relevance of which have not been contested* by [the petitioner], the Tennessee General Assembly could rationally conclude that sex offenders present an unusually high risk of recidivism.”<sup>140</sup> But the petitioner in this case did not challenge this assumption, and his ex post facto challenge failed. However, the Sixth Circuit, by noting that recidivism rates were not challenged, identified a key area in which future ex-post-facto challenges to SORAs should focus.

Still other circuits, even when presented with recidivism data indicating that sex offender recidivism rates may not be as frighteningly high as commonly supposed, have found ways to discredit the accuracy of that data or treat the data as irrelevant. In an opinion in which the Seventh Circuit ultimately rejected a challenge to Wisconsin’s SORA, Judge Posner essentially determined that Justice Department data on recidivism rates of sex offenders was inaccurate and inconclusive.<sup>141</sup> Judge Posner first cited to other studies estimating the reporting rates of sex offenses, from which he concluded that many sex offenses go unreported every year.<sup>142</sup> He then examined Justice Department statistics regarding child molesters,<sup>143</sup> acknowledged that only “39 percent [of child molesters] were rearrested . . . within three years,” and further admitted

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140. *Bredesen*, 507 F.3d at 1006 (emphasis added). The court later stated that “Doe provides no basis for us to conclude that the Act’s requirements are excessive in relation to its legitimate, nonpunitive purpose of protecting the public from the *undisputed* high rate of recidivism.” *Id.* (emphasis added).

141. The plaintiff-appellee in this case, Belleau, was convicted in the early 1990s of molesting multiple children. After release from prison, he was civilly committed in 2004 because he was deemed a “sexually violent person” as defined by Wisconsin law. In 2006, Wisconsin passed a law requiring, among other things, that persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives. WIS. STAT. § 301.48 (2006). Belleau was therefore required to wear a GPS monitor for the rest of his life. However, he challenged the validity of that statute, claiming, among other things, that it prescribed ex post facto punishment. *Belleau v. Wall*, 811 F.3d 929, 931 (7th Cir. 2016).

142. *Id.* at 933 (citing to two studies on sex offense reporting: one in which it was estimated that 70% of child sexual assaults reported in interviews had not been reported to the police (DAVID FINKELHOR ET AL., JUVENILE JUSTICE BULLETIN, SEXUALLY ASSAULTED CHILDREN: NAT’L ESTIMATES & CHARACTERISTICS 8 (2008)); and another estimating that 86% of sex crimes against adolescents go unreported to the police (U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 6 (2003))).

143. Judge Posner examined recidivism data on child molesters because the plaintiff-appellee in this case, Belleau, was previously convicted of molesting a child. *Belleau*, 811 F.3d at 930-33.

that this is a much lower re-arrest rate than that of non-sex offenders (68%).<sup>144</sup> Judge Posner also acknowledged that, of those 39% of child molesters that were re-arrested, *only 3%* of them were arrested for subsequent molestations.<sup>145</sup>

Child molestations are precisely the kind of sex offenses that SORAs were created to prevent. Indeed, these types of crimes were the primary catalyst for such laws.<sup>146</sup> But the desire to prevent people from becoming victims of sex offenses, however noble it may be, should not cause the guardians of the Constitution—federal judges—to ignore the reality that sex offenders are not compulsive recidivists. Judge Posner stated that “the 3 percent recidivism figure implies that as many as 15 percent of child molesters released from prison molest again.”<sup>147</sup> Judge Posner then concluded that this “high” 15% recidivism rate—a rate found only through his own analysis, but not in any empirical study—was “further evidence of the compulsive nature of [child molesters’] criminal activity.”<sup>148</sup> But even if Judge Posner’s calculation (based on *estimates* of under-reporting of sex offenses) of a 15% recidivism rate is assumed to be true, that rate is still significantly lower than the rates of recidivism traditionally identified by legislators and courts. This makes Judge Posner’s conclusion that child molesters compulsively recidivate at alarming rates particularly striking, especially in light of his well-known views on judicial decision-making.

For decades, Judge Posner has been a champion of judicial decision-making that is based on sound policy and the truth; he has consistently declined to reach decisions premised on assumption or tradition.<sup>149</sup> He has adhered to a “style of legal analysis” premised on “a sure understanding of the scientific . . . complexities, factual rather than legal, out of which

144. *Id.* at 934 (quoting RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, *supra* note 92, at 17, table 10).

145. *Id.*

146. See Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); and Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Title I, § 129(a), 120 Stat. 600.

147. *Belleau*, 811 F.3d at 934.

148. *Id.*

149. See RICHARD POSNER, REFLECTIONS ON JUDGING 5 (2013), in which Judge Posner describes his judicial decision-making approach, stating:

The realist places emphasis on the consequences of judicial rulings, and in that regard is pragmatic but only if the realist considers systemic as well as case-specific consequences and thus avoids shortsighted justice—justice responsive only to the “equities” of the particular case—and is analytical and empirical rather than merely intuitive and political.

Judge Posner also described himself as “a pragmatic judge.” *Id.*

cases arise.”<sup>150</sup> Judge Posner certainly engaged with the scientific data regarding recidivism rates of child molesters in *Belleau*.<sup>151</sup> But he incorrectly applied that data.

In *Belleau*, a psychologist reviewed Mr. Belleau’s case and found that he posed only an eight percent risk of re-offense.<sup>152</sup> Yet (according to Judge Posner) this psychologist’s individualized assessment was not to be trusted; data on sex offenders as a class needed to be consulted.<sup>153</sup> When that data provided an even lower recidivism rate, a new risk of recidivism was calculated for child molesters as a whole to prove that Mr. Belleau—an individual who belonged to that whole—did, in fact, pose a significant danger to society.<sup>154</sup> Judge Posner once wrote that judges like himself should “not draw a sharp line between law and policy . . . and between legal reasoning and common sense.”<sup>155</sup> Yet common sense, informed by data, demands a conclusion that is at odds with Judge Posner’s: that not all child molesters are compulsive recidivists. Judge Posner fell prey to the same flawed reasoning that the public, the state legislatures, and other federal judges have been ensnared by: he assumed that all sex offenders were dangerous, compulsive recidivists.

This unwillingness to accept that sex offender recidivism rates are low was further illustrated by the Ninth Circuit case *ACLU v. Masto*, in which the accuracy of the sex offender recidivism data relied upon by the Supreme Court in *Smith* was unsuccessfully challenged.<sup>156</sup> Judge Trott, who authored the opinion, stated:

Plaintiffs argue that *Smith* overstated the risk of sex-offender recidivism. They note that *Smith* cited several studies on sex offender recidivism. Plaintiffs then rely on an expert declaration critiquing the methodology of the recidivism studies in *Smith*. The district court did not make any factual finding regarding the risk of sex offender recidivism. *Even had it adopted the declaration’s conclusions as its own, a recalibrated assessment of recidivism risk would not refute the legitimate public safety*

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150. *Id.* at 4.

151. *Belleau*, 811 F.3d at 934.

152. *Id.*

153. *Id.*

154. *Id.*

155. See POSNER, *supra* note 149, at 120.

156. In *ACLU v. Masto*, the State of Nevada appealed the district court’s grant of injunctive relief to certain sex offenders enjoining the enforcement of two bills passed by the Nevada legislature: Assembly Bill 579, which expanded the scope of sex offender registration and notification requirements; and Senate Bill 471, which imposed residency and movement restrictions on certain sex offenders. 670 F.3d 1046, 1050 (9th Cir. 2012). These bills were challenged in the district court on several constitutional grounds, including ex post facto grounds. *Id.* at 1051.



*interest in monitoring sex-offender presence in the community.*<sup>157</sup>

But Judge Trott failed to explain why the legitimate public safety purpose of the law would not be refuted,<sup>158</sup> even if recidivism rates *were* much lower than previously supposed.<sup>159</sup> Based on Judge Trott's statement, it is unclear what could possibly form the basis for a rational public safety purpose even if recidivism rates were, in fact, very low. Judge Trott's logic here is questionable. A legitimate public safety interest in monitoring sex-offender presence in communities *only exists* if sex offenders are likely to recidivate. But if one assumes, for the sake of argument, that sex offenders are not likely to recidivate, and that they are in fact actually highly *unlikely* to recidivate, then the public safety interest in monitoring sex offenders no longer exists. To reach his decision, Judge Trott, like Judge Posner, subscribed to the myth that all sex offenders are dangerous recidivists.

Thus, for a challenge to a state SORA to succeed on ex post facto grounds in front of federal judges such as Judge Posner or Judge Trott, it would seem that sex offender recidivism rates must be shown by every available study to sit at zero percent. This surely will not happen. But that does not mean that the widely-held perception of high sex offender recidivism rates cannot be challenged. On the contrary, recidivism rates can and should be challenged in the courts, especially in light of recent data on recidivism rates and the Sixth Circuit's decision in *Snyder*. The federal courts must examine and apply actual, empirically-derived data on sex offenders; they must apply that data reasonably; and data focusing on a limited subgroup of sex offenders must not be construed as applicable to the whole.

*B. The Supreme Court Misapplied Recidivism Data in McKune v. Lile and Smith v. Doe*

The federal courts have relied on the *Smith* Court's characterization of sex offender recidivism rates as "frightening and high" for years. But

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157. *Id.* at 1057 (emphasis added).

158. Judge Trott ended his analysis of the Nevada statute's rational relation to a non-punitive purpose with the above-quoted statement and moved on to the next *Mendoza-Martinez* factor. No further explanation was given regarding why an extremely low recidivism rate would not remove a rational purpose of public safety. *Id.*

159. The expert for the plaintiffs in this case, Jill S. Levenson, Ph.D., explained that the statistics relied on in *Smith* were inaccurate and inapplicable to this case, and focused specifically on the study by the National Institute of Justice. Joint Answering Brief for Plaintiffs/Appellees at 26-27, *ACLU v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (No. 08-17471) (citing U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

this phrase first appeared not in *Smith*, but in the 2002 case, *McKune v. Lile*.<sup>160</sup> In *McKune*, the Court examined sex offender recidivism rates in the context of a claim that a sex offender treatment program for inmates violated the inmates' right against self-incrimination.<sup>161</sup> The *McKune* Court examined a number of statistics and reports on recidivism rates, several of which were also relied upon by the Court in *Smith*.<sup>162</sup> However, these reports were misapplied then and should not be used to support the assertion that sex offender recidivism rates are "frightening and high."<sup>163</sup>

In *McKune*, Justice Kennedy referenced a 1988 Justice Department compendium titled "A Practitioner's Guide to Treating the Incarcerated Male Sex Offender," stating, "the rate of recidivism of untreated [sex] offenders has been estimated to be as high as 80%."<sup>164</sup> If that statistic was true, recidivism rates were indeed "frightening and high." But that Justice Department guide, which is 231 pages long, cited numerous statistics on recidivism rates, many of which were very low—some were even in the single digits.<sup>165</sup> And the one source that claimed an 80% recidivism rate was an article published in the mass-market magazine, *Psychology Today*.<sup>166</sup> Incredibly, that statistic was unsupported by *any* empirical data.<sup>167</sup> As one author aptly put it, "[t]hat's it. The basis for much of American jurisprudence and legislation about sex offenders was rooted in an offhand and unsupported statement in a mass-market magazine, not a

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160. In *McKune*, an inmate imprisoned for a rape conviction at a Kansas correctional facility challenged the constitutionality of a sexual offender treatment program in which sex offenders were required to participate. As part of the treatment program, the inmates were required to admit guilt of criminal conduct, including uncharged offenses. If the inmates did not comply with this program, they lost privileges and freedoms and could be removed to harsher prison facilities. *McKune v. Lile*, 536 U.S. 24, 29, 33 (2002).

161. *Id.* at 29.

162. The *Smith* Court stated: "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune*, 536 U.S. at 33). This finding was derived from two statistical reports: U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 27 (1997) and U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1997).

163. For a comprehensive review of the Supreme Court's misuse of recidivism statistics in *Smith* and *McKune*, see Ira Mark Ellman & Tara Ellman, 'Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics, 30 CONST. COMMENT. 495 (2015).

164. *McKune*, 536 U.S. at 33 (citing NAT'L INST. CORR., A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER 44, 64 (1988)).

165. See generally NAT'L INST. CORR., A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER (1988).

166. See Robert E. Freeman-Longo & R. Wall, *Changing a Lifetime of Sexual Crime*, PSYCHOLOGY TODAY (Mar. 1986), at 58.

167. See *id.*

peer-reviewed journal.”<sup>168</sup>

Moreover, some of the data the Supreme Court relied on in *Smith* has been increasingly questioned and criticized. To support its position that the challenged reporting requirements of the Alaska SORA were not excessive, the Supreme Court cited a United States Department of Justice study for the claim that sex offenders commit additional sex offenses as late as 20 years after release from prison.<sup>169</sup> However, this finding was taken out of context. As explained by the expert for the plaintiff-sex-offenders in *ACLU v. Masto*, there were multiple reasons why the use of this study as an aid for judges reviewing ex post facto challenges was improper. First, the study dealt only with child molesters, so it was inapplicable to the broader, more general category of “sex offenders.” Second, not only were the subjects of the study child molesters, but they were child molesters *who had been civilly committed*—a group with a much higher recidivism risk than those who had not been civilly committed. Third, recidivism rates of child molesters who had been treated and released were much lower than those that had been civilly committed. Lastly, the *actual* recidivism rates of the high-risk subjects of this study were much lower than the recidivism rates *projected* by the study.<sup>170</sup> Yet these concerns did not stop the *Smith* Court from applying this narrow study to the broad category of sex offenders.<sup>171</sup>

The only further support cited to by the Supreme Court in *Smith* regarding recidivism rates was one sentence from *McKune* stating that “[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”<sup>172</sup> While it is true that the report titled *Recidivism of Prisoners Released in 1983* stated that released rapists were much more

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168. Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (Mar. 6, 2017), [https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html?\\_r=1](https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html?_r=1) [https://perma.cc/R8C4-74JA].

169. CHILD SEXUAL MOLESTATION: RESEARCH ISSUES, *supra* note 159, at 14.

170. This analysis of the Prentky, R. Knight and A. Lee study was undertaken by Dr. Levenson, who was the expert for the plaintiff-sex-offenders in this case. Joint Answering Brief for Plaintiffs/Appellees at 27, *ACLU v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (No. 08-17471). It is also worth noting that the authors of this study, Prentky, Knight, and Lee, explicitly stated that “the obvious heterogeneity of sexual offenders precludes automatic generalization of the rates reported here to other samples.” CHILD SEXUAL MOLESTATION: RESEARCH ISSUES, *supra* note 159, at 656-57.

171. With regard to whether the Alaska SORA was excessive, the Court—without citing to any other data on sex offender recidivism rates over time—found that lengthy reporting requirements were not excessive. *Smith v. Doe*, 538 U.S. 84, 104 (2003).

172. The Court in *McKune* derived this finding from two studies: SEX OFFENSES AND OFFENDERS, *supra* note 162, at 27 and RECIDIVISM OF PRISONERS RELEASED IN 1983, *supra* note 162, at 6.

likely than other types of offenders to be rearrested for rape, this finding merely compares the likelihood of prior rapists committing another rape versus a non-rapist committing a rape—a finding that is immaterial to the actual frequency with which sex offenders as a whole commit additional sex offenses.<sup>173</sup> Although the *Recidivism 1983* report indicates that 36.4% of rapists and 32.6% of other sexual offenders were reconvicted for subsequent offenses,<sup>174</sup> these rates are much lower than reconviction rates for many other types of offenders.<sup>175</sup> Further—and most importantly—these 36.4% and 32.6% reconviction rates represent convictions for *any offense*—not just reconviction for sexual offenses, indicating that reconviction rates for subsequent sex offenses are even lower.<sup>176</sup>

The other study the *Smith* Court cited to as proof of “frightening and high” recidivism rates was *Sex Offenses and Offenders (1997)*, which also contains findings that contradict the belief that sex offenders are such high recidivists.<sup>177</sup> Additionally, a three-year Bureau of Justice Statistics follow-up study of released offenders on probation revealed that those with prior rape convictions had significantly lower felony and violent felony re-arrest rates than most other categories of probationers.<sup>178</sup>

As the Supreme Court pointed out, both of these studies show that certain sub-groups of released sex offenders may commit subsequent sex offenses on a relatively more frequent basis than other types of released offenders. However, the Supreme Court failed to dig into the details of these studies, both of which show that sex offenders as a whole recidivate at very low rates.

*C. Empirical Studies Show That Recidivism Rates of Sex Offenders Are Very Low, Especially When Compared to Recidivism Rates of Other Types of Criminals*

*Smith* painted a dire picture of sex offender recidivism rates in the United States, and the public has generally accepted that sex offenders are

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173. RECIDIVISM OF PRISONERS RELEASED IN 1983, *supra* note 162, at 2.

174. *Id.* at 5, table 8.

175. *Id.* (indicating that the average reconviction rate is 46.8% for all offenses; 41.9% for violent offenses; 53% for property offenses; 35.3% for drug offenses; 41.5% for public order offenses; and 62.9% for all other offenses).

176. *Id.* at 2 (“Reconviction refers to a conviction on at least one charge after the date of release from prison.”).

177. *Id.* at 26 (indicating that all violent offenders were reconvicted 42% of the time for subsequent offenses after release, which was a higher reconviction rate than both released rapists (36%) and released offenders convicted of other sexual assaults (33%)).

178. *Id.* at 25-26 (finding that released rapists had re-arrest rates of 19%, while other released violent offenders were re-arrested at a rate of 41%).

compulsive recidivists.<sup>179</sup> More importantly, (at least as it relates to the creation of sex offender registration laws) politicians have echoed that sentiment.<sup>180</sup> But a more careful look at sex offender recidivism data paints a much different picture. This was the realization of Patty Wetterling, whose son, Jacob Wetterling, was abducted, sexually abused, and murdered as a young child in 1989.<sup>181</sup> Patty Wetterling said:

I based my support of broad-based community notification laws on my assumption that sex offenders have the highest recidivism rates of any criminal. But the high recidivism rates I assumed to be true do not exist. It has made me rethink the value of broad-based community notification laws, which operate on the assumption that most sex offenders are high-risk dangers to the community they are released into.<sup>182</sup>

This is a powerful statement. Very few people have more right to despise violent sex offenders than Patty Wetterling. Yet even she has been able to recognize that sex offender registration legislation has been built on a faulty foundation. As Dr. Jill Levenson said, “[s]exual violence is a serious problem, and any recidivism rate is too high. But recidivism rates for sex offenders are not as high as politicians have quoted in their attempts to justify the need for overly harsh sex offender laws.”<sup>183</sup>

Indeed, many studies report much lower rates of recidivism. In two follow-up studies to those cited to in *Smith*, convicted rapists and other sex offenders were found to be some of the least likely criminals to

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179. Human Rights Watch reports that “[s]ex offender laws also reflect the assumption that previously convicted sex offenders are responsible for most sex crimes.” *No Easy Answers*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us#730a8b> [<https://perma.cc/4JDP-HW38>].

180. Then-representative Jennifer Dunn (R-WA), speaking in support of Megan’s Law, stated that “the rate of recidivism for these crimes is astronomical because these people are compulsive. We know that.” 140 Cong. Rec. H 8414 (1994). Then-representative Mark Foley (R-FL), speaking in support of strengthened sex offender laws, stated “there is a 90 percent likelihood of recidivism for sexual crimes against children. Ninety percent. That is the standard. That is their record. That is the likelihood. Ninety percent.” 151 Cong. Rec. 7394 (2005). Unfortunately, “legislators rarely cite, nor are they asked for, the source and credibility of such figures.” *Id.* Human Rights Watch also reports that politicians often cite to sex offender recidivism rates of 80-90%. But most sex offenders do not commit sex offenses again after release from prison (three out of four do not re-offend). Further, most sex offenses are perpetrated by first-time offenders. *Id.*

181. Patty Wetterling founded the Jacob Wetterling Foundation after her son’s abduction. Federal sex offender legislation was named after Jacob Wetterling (the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which required law enforcement to create and maintain a registry of convicted sex offenders). *Id.*

182. *Id.*

183. Human Rights Watch telephone interview with Dr. Jill Levenson, professor of Human Services at Lynn University and national expert on sex offender management (October 31, 2006). *Id.* Dr. Levenson is a leading researcher in the field of sex offender recidivism.

recidivate.<sup>184</sup> The Sixth Circuit made note of this in its *Snyder* decision.<sup>185</sup> Other types of offenders, such as those who had committed drug offenses and public-order offenses, have much higher re-arrest rates than sex offenders.<sup>186</sup> Re-arrest rates for released rapists were 46%, and 41.4% for released offenders who had committed other sex offenses.<sup>187</sup> Importantly, these rates indicated arrests for *any type of offense*—not just sex offenses.<sup>188</sup> In fact, within three years, only 2.5% of released rapists were arrested for another rape.<sup>189</sup> Further, only 5.3% of sex offenders were re-arrested for a new sex offense—3.5% of whom were *convicted* for a new sex offense.<sup>190</sup>

Higher rates of recidivism have been inaccurately reported, however. One prominent example, *Lifetime Sex Offender Recidivism: A 25-Year Follow-up Study*, found that sex offenders recidivated at a rate of 88.3%.<sup>191</sup> At first blush, this number seems to confirm the popular sentiment that sex offenders are compulsive recidivists. However, this study has been heavily criticized. In his comprehensive study titled *Sex Offender Recidivism*, Keith Soothill explained that the *Lifetime Sex Offender* study had a “serious sample selection bias” because it only examined a sample of “offenders referred for psychiatric assessment or treatment,” and those offenders could not “be considered as representative of all sex offenders.”<sup>192</sup> Soothill also noted that this study’s findings have been deemed inapplicable because of this problem.<sup>193</sup>

Findings like those in the *Lifetime Sex Offender* study—erroneous

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184. BUREAU OF JUSTICE STATISTICS., *RECIDIVISM OF PRISONERS RELEASED IN 1994* 1 (2003) (“[R]eleased prisoners with the lowest rearrest rates were those in prison for homicide (40.7%), rape (46.0%), other sexual assault (41.4%).”); *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, *supra* note 92, at 24 (reporting that sex offenders are less likely to recidivate than other criminals).

185. *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (“One study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually less likely to recidivate than other sorts of criminals.”). *Id.* at 700.

186. *RECIDIVISM OF PRISONERS RELEASED IN 1994*, *supra* note 184, at 2 (“Property offenders had the highest rearrest rate, 73.8%; released drug offenders, 66.7%; and public-order offenders (mostly those in prison for driving while intoxicated or a weapons offense), a 62.2% rate.”).

187. *Id.* at 8.

188. *Id.* at 2.

189. *Id.*

190. *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, *supra* note 92, at 24.

191. Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow-up Study*, 46(5) *CANADIAN J. OF CRIM. JUST.* 531-52 (2004).

192. Keith Soothill, *Sex Offender Recidivism*, 39 *CRIME & JUST.* 145, 158 (2010).

193. *Id.* at 158 (quoting Cheryl M. Webster, Rosemary Gartner & Anthony N. Doob, *Results by Design: The Artefactual Construction of High Recidivism Rates for Sex Offenders*, 48(1) *CANADIAN J. OF CRIM. JUST.* 79 (2006) (“[T]his unusually high level is *uninterpretable* because the offenders whose criminal careers were followed are unlikely to be representative of sex offenders in general.”).

and inapplicable as they may be—present a very real perception problem for convicted sex offenders. Public interest in sex crimes has grown steadily in the past several decades, resulting in heightened media coverage of these crimes.<sup>194</sup> As Soothill explains, inaccurate reports of high sex offender recidivism rates attract a great deal of media publicity because they seem to “confirm popular prejudices about the high recidivism rates of sex offenders.”<sup>195</sup> And, unfortunately, “[p]ublic attitudes are molded in part by media representation. Media interest, in turn, partly explains the current discrepancy between public and professional perceptions of sex offending.”<sup>196</sup>

The professional perception of sex offenses is that most sex offenses are committed by unregistered individuals, and that *recidivism* rates are actually very low.<sup>197</sup> One of the most comprehensive studies on sex offender recidivism, which analyzed a sample of over 29,000 sex offenders, reported that 14% of all sex offenders would either be arrested or convicted for new sex offenses within four to six years of their release.<sup>198</sup> This 14% recidivism rate is nothing to scoff at. But this 14% rate means also that, within four to six years after their release, 86% of sex offenders are *not* going to commit another sex offense. Another study by the Ohio Department of Rehabilitation and Correction found that only 8% of released sex offenders were re-incarcerated for committing another sex offense.<sup>199</sup> And the view that sex offender recidivism rates are very

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194. *Id.* at 151 (“[T]he darker side of an increasing interest in child sex murder has been the media seeing much potential in exploiting the topic for marketing purposes.”).

195. *Id.* at 158.

196. *Id.* at 151. *See also* Eileen K. Fry-Bowers, *Controversy and Consequence in California: Choosing Between Children and the Constitution*, 25 WHITTIER L. REV. 889 (2004) (“Megan, Jacob, Samantha—their names are forever memorialized in newspaper headlines, while the circumstances surrounding their deaths provoked fear and anger in members of the public, particularly parents.”).

197. SEX OFFENSES AND OFFENDERS, *supra* note 162 (indicating that, of all individuals arrested for sex crimes, 87% had not previously been convicted of a sex offense).

198. Andrew Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question*, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA 3-7 (2004). This study reviewed data from ten other follow-up studies. The studies examined adult male sexual offenders from the United States, United Kingdom, and Canada.

199. David A. Singleton, *What is Punishment?: The Case for Considering Public Opinion Under Mendoza-Martinez*, 45 SETON HALL L. REV. 435, 453 (2015) (citing OHIO DEP’T OF REHAB. & CORR., TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 10 (2001), [http://www.drc.state.oh.us/web/reports/ten\\_year\\_recidivism.pdf](http://www.drc.state.oh.us/web/reports/ten_year_recidivism.pdf) [<https://perma.cc/A9Y3-FCHM>] (explaining that a sexually related parole violation includes actions such as possession of pornography)). *See also* Anthony J. Petrosino & Carolyn Petrosino, *The Public Safety Potential of Megan’s Law in Massachusetts: An Assessment from a Sample of Criminal Sexual Psychopaths*, 45 CRIME AND DELINQUENCY 140, 150 (1999) (finding that, of the 136 new sex crimes that occurred in a specific jurisdiction in Massachusetts, only 12 stranger-predatory offenses were committed by registered or registry-eligible sex offenders).

low has been expressed often in the scholarly legal commentary on this subject.<sup>200</sup>

While a review of these numbers may be a rather dry exercise, the numbers clearly illustrate a common theme: based on available data, the likelihood of released sex offenders committing additional sex crimes is very low.

#### VI. EMPIRICAL DATA SHOWS THAT OFFENSE-BASED PUBLIC REGISTRATION HAS, AT BEST, NO IMPACT ON RECIDIVISM

In light of the very low rates at which sex offenders recidivate, courts and legislators may be tempted to conclude that SORAs are actually achieving their professed, non-punitive purpose. But such a conclusion would be contrary to the available empirical data on the subject. A careful examination of the available data shows that 1) sex offender recidivism rates have not declined meaningfully since the enactment of modern SORAs; 2) that offense-based public registration has, at best, no impact on recidivism; and 3) that recent data indicates that offense-based public registration may even *cause* recidivism by exacerbating risk factors.

##### A. *The Federal Courts Have Not Questioned the Validity of the Belief That Expansive, Offense-Based Restrictions on Sex Offenders Will Reduce Recidivism Rates*

As with the supposedly “frightening and high” recidivism rates of sex offenders, the federal courts have also not questioned whether SORAs actually serve their intended purpose of reducing recidivism. The assumption that SORAs reduce recidivism is relevant to two of the *Mendoza-Martinez* factors: 1) whether a SORA has a rational relation to a non-punitive purpose; and 2) whether a SORA is excessive in relation to that purpose.<sup>201</sup> The stated purpose of SORAs is to promote public

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200. See Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 383 (2005) (“[A]ccording to some studies, sex offenders actually have lower recidivism rates than other groups of offenders.”); Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 896 (1995) (“[S]ex offenders are not more likely than other criminals to be recidivists.”); Leonore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & L. 275, 301 (2000) (“[W]hat is clear is that there is no empirical evidence that predictions of future sex offenses based on convictions for past ones are accurate.”); and Fry-Bowers, *supra* note 196, at 909-10 (“Although one episode of sexual assault is intolerable, it is noteworthy that recidivism rates for sex offenders are lower, in comparison to the general criminal population, a fact that clearly undermines legislative assertions that public notification is ‘necessary and compelling’ because sex offenders have a high risk of re-offending.”) (internal citation omitted).

201. See generally *Smith v. Doe*, 538 U.S. 84 (2003).



safety by reducing recidivism.<sup>202</sup> Thus, if recidivism rates are high—as the courts have assumed they are—then a law that allows law enforcement and the public to carefully monitor sex offenders must be rationally related to the purpose of recidivism reduction.<sup>203</sup> And as long as that law does, in fact, reduce recidivism, then it is likely not excessive in relation to its purpose, because the constitutionality of the law does not hinge on whether it is “narrowly drawn to accomplish [its] stated purpose.”<sup>204</sup> But if the stated purpose of SORAs—reduction of high sex offender recidivism rates—rests on a false premise, then even a SORA that is narrowly drawn becomes excessive. Stated differently, a law cannot be validly created to accomplish an invalid purpose.

Since the *Smith* decision, all of the federal appeals courts have heard ex post facto challenges to SORAs and have found that the statutes had a rational connection to a non-punitive purpose and were not excessive in relation to that purpose.<sup>205</sup> The First Circuit entertained such a challenge, but because it assumed the existence of high rates of recidivism, it followed that laws requiring sex offenders to register and to alert the public as to their status and location would reduce recidivism.<sup>206</sup> In its analysis, the First Circuit did not examine any data regarding whether SORAs actually reduce recidivism; that belief was assumed.<sup>207</sup> This is not surprising, however. Sex offender registration laws would not be enacted if their proponents did not believe that the laws would achieve their professed purpose of recidivism reduction.<sup>208</sup>

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202. In *Smith*, the Court noted that the Alaska legislature found that sex offenders recidivate at high rates, “and identified ‘protecting the public from sex offenders’ as the ‘primary governmental interest’ of the law.” *Id.* at 93. In *Snyder*, the court noted that the Michigan legislature’s stated purpose for enacting its SORA was to “better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders.” *Doe v. Snyder*, 834 F.3d 696, 700 (6th Cir. 2016).

203. *Smith*, 538 U.S. at 103 (“Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature’s findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is ‘frightening and high.’”) (internal citation omitted).

204. *Id.* at 102-03.

205. See *supra* note 32.

206. *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012) (holding that public dissemination of sex offender registry data was not excessive, but was reasonable in light of the non-punitive objective of the SORA).

207. The stated purpose of the SORA in this case was “to protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders.” 42 U.S.C. § 16901 (2012). *Parks*, 698 F.3d at 5. Inherent in that purpose statement was the assumption that the laws would effectively achieve that purpose. Indeed, that was the very reason for passing the law.

208. When signing the Adam Walsh Child Protection and Safety Act of 2006, President Bush

The other federal circuit courts have similarly rejected challenges to state SORAs without questioning whether the SORAs could actually achieve their stated purpose. The Second Circuit, in support of its holding that New York's SORA's registration requirement amendments were regulatory and not punitive, accepted—without question—that “registration . . . serves the general goal of protecting members of the public from the potential dangers posed by convicted sex offenders.”<sup>209</sup> In *Doe v. Bredesen*, the Sixth Circuit (prior to its *Snyder* decision) wrapped up its analysis of Tennessee's SORA's rational relation to a non-punitive purpose with its analysis of the excessiveness of the SORA. The court stated that because the high recidivism rates of sex offenders were undisputed, “the Tennessee General Assembly could rationally conclude that sex offenders present an unusually high risk of recidivism, and that stringent registration, reporting, and electronic surveillance requirements can reduce that risk and thereby protect the public without further ‘punishing’ the offenders.”<sup>210</sup> Thus, the *Bredesen* court's assumption that sex offender registries would reduce recidivism rested heavily on the assumption that recidivism rates were actually very high. Many other circuits have simply relied on *Smith's* analysis to support the inference that sex offender registries reduce recidivism.<sup>211</sup>

*B. Empirical Data Shows That Registration and Notification Laws Either Have No Impact on Recidivism Rates, or Instead Cause*

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explained that:

The bill I sign today will greatly expand the National Sex Offender Registry by integrating the information in State sex offender registry systems and ensuring that law enforcement has access to the same information across the United States. It seems to make sense, doesn't it? . . . Data drawn from this comprehensive registry will also be made available to the public so parents have the information they need to protect their children from sex offenders that might be in their neighborhoods.

Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1395, 1396 (July 27, 2006).

209. *Doe v. Cuomo*, 755 F.3d 105, 112-15 (2d Cir. 2014) (finding New York's SORA to be non-punitive and constitutional).

210. *Doe v. Bredesen*, 507 F.3d 998, 1006 (6th Cir. 2007) (finding Tennessee's SORA to be non-punitive and constitutional).

211. See *Belleau v. Wall*, 811 F.3d 929, 934-37 (7th Cir. 2016) (concluding that recidivism rates were high, despite examining data to the contrary, and ultimately assuming that registries reduce recidivism); *Riley v. Corbett*, 622 F. App'x 93, 95 (3d Cir. 2015) (finding that the provisions of Pennsylvania's SORA were not materially different from the provisions of Alaska's SORA and, therefore, were not punitive in effect); *United States v. Shannon*, 511 F. App'x 487, 492 (6th Cir. 2013) (“[The Adam Walsh Act's] regulatory purpose and the means used to achieve it is not materially different from that of the Alaska statute in [*Smith*].”); and *Steward v. Folz* 190 F. App'x 476, 478 (7th Cir. 2006) (relying on *Smith* to support its brief analysis of the constitutionality of Indiana's SORA, concluding that the SORA was not punitive).

*Recidivism Rates to Increase*

Although Congress and state legislatures, as well as the federal courts, have accepted—as fact—the assumption that SORAs reduce recidivism rates, empirical studies have not supported this assumption. SORAs do not reduce recidivism, and, therefore, do not protect the public. These laws do, however, impact the public's perception of sex offenders in a manner that negatively impacts these sex offenders' lives and makes them *more* likely to recidivate.

A major justification for SORAs is that, once sex offenders understand that they are being monitored by the public, they will be discouraged from committing additional sex offenses.<sup>212</sup> This justification is unsupported by empirical data. As noted in a leading study on this topic, early research on the effectiveness of SORAs found no “statistically significant” reduction in recidivism rates of sex offenders after the enactment of SORAs.<sup>213</sup> More recently conducted research has found “little evidence that [SORAs] have had any meaningful influence on the overall number of sex offenses.”<sup>214</sup>

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212. An additional, related justification for SORAs—particularly their notification provisions—is that these laws will motivate the public to take preventative action once they have been informed of the presence of sex offenders in their communities. A recent study notes that “[t]he logic behind these laws is that by providing the public with information about a potential threat to safety, citizens will be motivated to take protective actions to mitigate their risk for victimization.” Rachel Bandy, *Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors*, 10 CRIMINOLOGY & PUB. POL’Y 237 (2011). Yet this study, as well as others, found that the public generally does not take protective action once they have been notified of a potential threat posed by a sex offender in their community. Specifically, the study reported that it “did not discover any significant relationship between notification and self-protective behaviors, nor did the research of [Amy L. Anderson and Lisa L. Sample, *Public Awareness and Action Resulting from Sex Offender Notification Laws*, 19 CRIM. JUST. POL’Y REV. 371-96 (2008)], [Beck, Victoria Simpson and Lawrence F. Travis, *Sex Offender Notification and Protective Behavior*, 19 VIOLENCE & VICTIMS 289-302 (2004)], or [Alicia A. Caputo and Stanley L. Brodsky, *Citizen Coping with Community Notification of Released Sex Offenders*, 22 BEHAV. SCIENCES AND THE LAW 239-52 (2004)].” *Id.* at 256. In fact, even parents of children were found to take only minimal precautions once they had been notified of the presence of sex offenders in their communities. *Id.*

213. Prescott & Rockoff, *supra* note 93, at 162-63. “The first studies that sought to measure the impact of registration and notification laws compared the recidivism rates of offenders released just before and after registration and notification laws became effective in Iowa and Washington (Schram and Milloy 1995; Adkins, Huff, and Stageberg 2000) . . . [but] neither study found a statistically significant difference in the frequency of subsequent arrests for sex offenses between these two groups.” Prescott and Rockoff acknowledged, however, that those two studies relied on relatively small sample sizes. *Id.* at 162.

214. *Id.* at 163. “More recent studies examine the relationship between the timing of legislation and changes in the annual frequency of sex offenses across states, using data from the Federal Bureau of Investigation’s (FBI’s) Uniform Crime Reporting (UCR) Program (Shao and Li 2006; Agan 2007; Vasquez, Maddan, and Walker 2008),” and concluding that these studies, when considered together, show that SORAs have not had a meaningful impact on sex offender recidivism rates. *Id.*

Another study, conducted in 2011, found “little evidence to support the effectiveness of sex offender registries, either in practice or in potential.”<sup>215</sup> This study first examined recidivism rates of sex offenders both before and after enactment of SORAs in individual states.<sup>216</sup> The study found that states that implemented publicly-accessible sex offender registries did not see a reduction in sex offender recidivism after the registries were implemented.<sup>217</sup> The study also compared recidivism rates of sex offenders who were released into states with sex offender registries to sex offenders released into states without registries.<sup>218</sup> Again, sex offenders did not recidivate less when released into states with sex offender registries—if anything they recidivated at higher rates when they were required to register.<sup>219</sup> Lastly, the study examined population blocks with greater concentrations of sex offenders to see if higher numbers of sex offenders in a given population area corresponded to higher rates of sex crimes.<sup>220</sup> However, “[t]he results show that knowing where a sex offender lives does not reveal much about where sex crimes, or other crimes, will take place.”<sup>221</sup> These findings undermine the justification for creating sex offender registries in the first place because they show that SORAs are not achieving their professed purpose of recidivism reduction.

In support of its decision that Michigan’s SORA was unconstitutional, the *Snyder* court relied on another sophisticated study that compared the recidivism rates of sex offenders before the enactment of SORAs to recidivism rates after enactment.<sup>222</sup> To ensure accurate results, the researchers bifurcated their analysis, examining the effects of *registration* provisions of SORAs separately from the effects of *notification* provisions.<sup>223</sup> After the enactment of both registration and notification provisions, reported sex offenses did decline overall.<sup>224</sup> However, *recidivism* rates did not decline as a result of either registration or notification laws.<sup>225</sup> In fact, the notification provisions of SORAs led

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215. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & ECON. 207, 208 (2011).

216. *Id.* at 208.

217. *Id.* at 208, 222-23.

218. *Id.* at 208.

219. *Id.* at 208, 229.

220. *Id.* at 208-09.

221. *Id.* at 233.

222. Prescott & Rockoff, *supra* note 93, at 162.

223. *Id.* at 163.

224. *Id.* at 192 (explaining that registration did slightly reduce the frequency of reported sex offenses, but only offenses against local victims; registration laws did not correlate with any change in sex offenses against strangers).

225. *Id.* (explaining that, while registration and notification laws did appear to reduce crime,

to an *increase* in recidivism rates of registered sex offenders, likely because such provisions exacerbate recidivism risk factors.<sup>226</sup> When a notification provision was implemented as part of a sex offender registry, recidivism increased by 1.57%.<sup>227</sup> The study opined that the increase was likely due to “the social and financial costs associated with the public release of [sex offenders’] criminal history and personal information.”<sup>228</sup>

Indeed, SORAs have significant, measurable negative impacts on the lives of sex offenders,<sup>229</sup> particularly on their ability to obtain employment. Many SORAs—including Michigan’s—expressly restrict employment opportunities for sex offenders.<sup>230</sup> However, the stigma that accompanies the sex-offender label often eliminates employment opportunities, even when statutory provisions do not expressly prohibit employment.

The United States Department of Justice notes that “[m]any employers are reluctant to hire sex offenders because of the stigma that follows them, and most sex offenders are restricted by special conditions of their supervision.”<sup>231</sup> It is well known that released criminals have greater difficulty finding jobs than individuals without criminal records. And “research on recidivism of the general criminal population [has] identified a history of unstable employment as one of the factors that consistently is associated with subsequent criminal behavior.”<sup>232</sup> Sex offenders not only have criminal records, but they also have the stigma

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they only did so by deterring non-registered (i.e., new) offenders).

226. *Id.* at 164, 192 (“Importantly, we detect no evidence that notification laws (as opposed to registration laws) curtail crime by reducing recidivism among convicted sex offenders; the estimated effect of notification is actually weaker when a state applies the law to a large number.”).

227. *Id.* at 192.

228. *Id.*

229. See Stephanie N.K. Robbins, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 221 (2010). The collateral consequences that accompany sex-offender status are numerous, including not only stigmatization, but also legally mandated consequences, such as “disenfranchisement, employment restrictions or prohibitions, loss of ability to possess a firearm, deportation,” or consequences that are “social in nature (stigmatization, family ostracism, loss of housing, financial losses, etc.).” *Id.* (quoting Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 68-69 (2005)). This Article further explained that “[c]ollateral consequences are problematic because they may aggravate ‘risk factors for recidivism such as lifestyle instability, negative moods, and lack of positive social support.’” *Id.* (quoting Jill S. Levenson et al., *Megan’s Law and Its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 590 (2007)).

230. See 2005 Mich. Pub. Acts 121, 127 (prohibiting registered sex offenders from living, loitering, or working within 1,000 feet of a school) (emphasis added).

231. U.S. DEP’T OF JUSTICE, CTR. FOR SEX OFFENDER MGMT., TIME TO WORK: MANAGING THE EMP. OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 1 (2002).

232. *Id.* (citing P. Gendreau, T. Little & C. Goggin, *A Meta-Analysis of the Predictors of Adult Criminal Recidivism: What Works*, 34 CRIMINOLOGY 575-607 (1996)).

that accompanies their sex-offender status, which makes it even more difficult for sex offenders to secure employment.<sup>233</sup> Yet, several empirical studies have shown that stable employment directly correlates to decreased recidivism.<sup>234</sup> One study found that sex offenders who committed multiple sex offenses had more difficulty finding employment than those with fewer sex offenses.<sup>235</sup> The Justice Department also noted that, according to another study, “the only factors associated with reduced re-offending among sex offenders were the combination of stable employment and sex offender treatment.”<sup>236</sup> This research indicates that stable employment can significantly mitigate a sex offender’s risk of re-offense. Yet, SORAs are doing the opposite—they are *exacerbating* recidivism risk factors by erecting barriers to employment.

While SORAs have not been shown to reduce recidivism of sex offenders, these laws have been shown to have significant negative impacts on the lives of sex offenders. However, despite the lack of empirical support for the conclusion that SORAs reduce recidivism, legislatures continue to consider legislation that would more severely burden convicted sex offenders, without any meaningful indication that those restrictions will reduce recidivism.<sup>237</sup>

## VII. CONCLUSION

The assumptions that SORAs have been built on are just that—assumptions. But those assumptions are belied by the facts: sex offenders do not recidivate at frightening and high rates, and registration and notification laws do not decrease recidivism. Once this is understood, the

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233. *Id.*

234. *Id.* at 2.

235. *Id.* (citing R.K. HANSON AND A. HARRIS, DEP’T OF THE SOLICITOR GEN. OF CANADA, DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM (1998)).

236. *Id.* (citing C. Kruttschnitt, C. Uggen & K. Shelton, *Predictors of Desistance Among Sex Offenders: The Interactions of Formal and Informal Social Controls*, 17 JUSTICE QUARTERLY 61, 61–87 (2000) (finding that sex offenders with stable employment at the time of their sentencing were 37% less likely to be convicted for a subsequent sex offense than sex offenders with unstable work histories)).

237. Prescott & Rockoff, *supra* note 93, at 161, 192–93. The authors concluded by stating that: The lack of empirical evidence for the recidivism-reducing benefits of registration and notification has not stopped policy makers from imposing additional restrictions on convicted sex offenders. Registration and notification laws are now, in some sense, old technology. Today, states are in the midst of imposing even more intrusive laws, such as residency restrictions and civil commitment, with fresh hope of reducing recidivism. These policies may impose even higher costs on sex offenders and their families than registration and notification laws have, and research is needed to understand if the effects, if any, of these policies on criminal behavior makes these investments worthwhile.

*Id.*

rational connection of SORAs to the purpose of reducing recidivism no longer exists; it is not rational to attempt to fix a non-existent problem by adopting a solution that does not work. Absent a connection to a non-punitive purpose, and in light of the fact that registration for sex offenders is usually triggered by nothing more than a conviction, sex offender registration laws such as those in *Snyder* must be considered punitive. Currently, state SORAs impose retroactive punishment on an incredibly broad class of people—the majority of whom will never commit another sex offense. SORAs are not accomplishing their noble goal of protecting the vulnerable from dangerous sexual predators. As Human Rights Watch opined, “[i]f sex offender registries were limited to previously convicted sex offenders who had committed sexually violent crimes or sex crimes against children and who have been individually assessed as presenting a high or medium risk of committing similar crimes again, registration might help protect the public.”<sup>238</sup> But SORAs are neither limited nor individualized. As a result, they do not effectively protect the public.

If the federal courts will accept that recidivism rates are not frighteningly high and that SORAs do not reduce recidivism, then a rational connection to a non-punitive purpose will not be present. The most heavily-weighted *Mendoza-Martinez* factor would then weigh toward a finding that SORAs are punitive in effect. And once the courts acknowledge that the expansive restrictions SORAs impose are not counter-balanced by any proven, positive effects—that they are not reducing recidivism—then the SORAs must also be considered excessive. Two *Mendoza-Martinez* factors now weigh toward finding SORAs punitive. Lastly, many of the circuit courts that have heard challenges to SORAs have admitted that SORAs promote the traditional aims of punishment—retribution and deterrence. Thus, the balance has tipped, as three out of the five pertinent *Mendoza-Martinez* factors, including the most heavily-weighted factor, favor finding SORAs punitive.

These factors provide the framework for determining whether a law violates the Ex Post Facto Clause. But these factors should not be applied in a rigid, concrete manner—they are guidelines, not inflexible mandates. Judges should employ a holistic approach when analyzing these factors, considering the overall purposes and effects of SORAs when determining whether the laws are constitutional. Thus, the judicial analysis of challenges to the constitutionality of SORAs ought to be based “on a sure understanding of the scientific . . . complexities, factual rather than legal,

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238. *No Easy Answers*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us#730a8b> [<https://perma.cc/X86A-WV6C>].

out of which the cases arise.”<sup>239</sup> But the factual understanding upon which these laws rest is not well understood. As Judge Posner asserted, rules and statutes “are merely particular responses to particular states of fact (assumed to be true whether or not they are). The law is, and I dare say always will be, *ad hoc* and *ad hominem* to a fault.”<sup>240</sup> The danger posed by “sex offenders” has been overstated. This overstatement has led to overly-broad and ineffective legislative responses. The science and data now available show that those responses were inappropriate.

Thus, civil regulatory laws enacted under misapprehensions fueled by “those sudden and strong passions to which men are exposed” should now be acknowledged as the punitive measures that they truly are.<sup>241</sup> When faced with actual data reporting how infrequently sex offenders recidivate, even Patty Wetterling was forced to “rethink the value of broad-based community notification laws.”<sup>242</sup> The federal courts should rethink them, too.<sup>243</sup> The courts should follow the example the Sixth Circuit set in its *Snyder* decision and protect the rights of United States’ residents, like Virgil McCranie, to be free from ex post facto punishment.

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239. POSNER, *supra* note 149, at 4.

240. *Id.* at 7 (quoting Grant Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 108 (1970)).

241. See *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

242. *No Easy Answers*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us#730a8b> [<https://perma.cc/NVN3-J46J>].

243. The Sixth Circuit’s ruling in *Snyder* was appealed by the State of Michigan to the Supreme Court of the United States on December 14, 2016. See *Petition for a Writ of Certiorari*, Richard Snyder, et. al., v. John Does #1-5, et. al., No. 16-768, 2017 WL 4339925. The respondents, John Does #1-5, filed an opposition brief on February 16, 2017. See *Brief in Opposition*, Richard Snyder, et. al., v. John Does #1-5, et. al., No. 16-768, 2017 WL 4339925. The Supreme Court ultimately declined to hear the case on October 2, 2017.